

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
ASAP Paging, Inc.)	WC Docket No. 04-6
Petition for Preemption of Public Utility Commission of Texas)	
Concerning Retail Rating of Local Calls to CMRS Carriers)	

OPPOSITION OF CENTURYTEL OF SAN MARCOS, INC.

Carrick Inabnett
Associate Corporate Counsel
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

Karen Brinkmann
Tonya Rutherford
Clara M. Martone-Boyce
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for CenturyTel of San Marcos, Inc.

March 23, 2004

Table of Contents

I.	BACKGROUND	1
A.	Factual Background	1
B.	The Texas PUC’s Decision.....	6
II.	PREEMPTION IS INAPPROPRIATE HERE BECAUSE THE TEXAS PUC’S DECISION WAS BASED ON A PROPER APPLICATION OF STATE LAW THAT DOES NOT CONFLICT WITH OR INTRUDE ON FEDERAL REGULATION.	8
A.	Express Preemption is Not Warranted Under Either Section 253 or Section 332 of the Act.....	9
1.	Preemption is Not Warranted Under Section 253 of the Act.	9
2.	Preemption is Not Warranted Under Section 332(c)(3) of the Act.	14
B.	Preemption is Not Otherwise Warranted Under the Supremacy Clause.....	16
1.	Neither Express Preemption Nor Implied is Warranted Under the Supremacy Clause.	17
2.	Conflict Preemption is Not Warranted Under the Supremacy Clause Because There is No Conflict of Law Nor Any Impossibility of Compliance by ASAP With State and Federal Law.	18
(a)	The Texas PUC’s Actions Were Within Its Authority to Regulate Intrastate Activities and Do Not Frustrate or Intrude on Federal Regulation.	18
(b)	Preemption is Not Warranted Because it is Possible for ASAP to Comply with Both Federal Law and the Texas Decision.....	20
III.	CONCLUSION	22

SUMMARY

The Petition for Preemption (“Petition”) filed by ASAP Paging Inc. (“ASAP”), a CMRS carrier and non-dominant wireline telecommunications carrier in Texas, fails to justify federal preemption of a Public Utility Commission of Texas (the “Texas PUC”) order that allowed CenturyTel of San Marcos (“CenturyTel”), a local exchange carrier (“LEC”), to charge CenturyTel customers non-discriminatory toll charges in accordance with its tariff and consistent with state law on state-created extended local calling service (“ELCS”) areas.

San Marcos is part of an ELCS area approved by the Texas PUC. Under the ELCS arrangement, San Marcos local exchange customers pay a monthly ELCS fee in order to make calls to customers within adjacent exchanges Fentress, Kyle, and Lockhart (“San Marcos ELCS Area”) without incurring toll charges.¹ ASAP has no point of interconnection (“POI”) located within the San Marcos ELCS Area that allows for termination of traffic from San Marcos; therefore, traffic to ASAP’s paging and internet service provider (“ISP”) customers must travel outside the San Marcos ELCS Area over a toll trunk between the CenturyTel San Marcos tandem and the Southwestern Bell Telephone (“SWBT”) Greenwood tandem in Austin, Texas to reach ASAP’s facilities in Austin.

For several years ASAP has had in place a wide-area calling arrangement for the 512/222 NPA-NXX code that ASAP assigned to the majority of its paging customers. Pursuant to this arrangement, LEC customers in the San Marcos ELCS Area

¹ To provide this arrangement, CenturyTel interconnects with SWBT and Verizon through two-way jointly-provisioned end-office to end-office trunks.

are able to call the 512/222 NXX for the majority of ASAP's paging customers without incurring a toll charge even though all of the calls are routed to Austin. ASAP compensates CenturyTel through reverse-billing for these calls. Recently, however, ASAP has nominally associated with the San Marcos ELCS Area some other NPA-NXXs that are not covered by the wide-area calling agreement.² ASAP has in the LERG associated the 512/265, 512/384, and 512/580 NPA-NXXs ("Austin Virtual NXX Codes") with the San Marcos ELCS Area so that CenturyTel will not impose on CenturyTel's customers in San Marcos toll charges that otherwise would be incurred when calling these numbers even though there is no relationship between the ASAP customer assigned an Austin Virtual NXX Code and the San Marcos ELCS Area. ASAP's theory is that these codes are associated with the San Marcos ELCS Area and therefore should be toll-free. Nor does ASAP have a POI in the Kyle, Lockhart or Fentress exchanges that will allow for the termination of traffic from San Marcos. Because the calls are physically routed to ASAP's Austin switch, which is located outside the San Marcos ELCS Area, and they are not covered by a wide-area calling arrangement, the Texas PUC concluded that CenturyTel may, in accordance with its published tariff, charge its own customers a toll charge to call these numbers and route the traffic to Austin over a designated intraLATA toll trunk.

The Texas PUC upheld the toll charge, explaining that the sole purpose of ELCS is to provide toll-free calling to areas with geographical proximity or a community of interest. The Texas PUC correctly determined that Austin, the point of

² ASAP has created "virtual NXXs" where the customer using the NPA-NXX is not in the rate center associated with that NPA-NXX in the Local Exchange Routing Guide ("LERG").

interconnection, was the location of the “called party” for calls to the Austin Virtual NXX Codes. Because Austin is not geographically proximate to the San Marcos ELCS Area, the Texas PUC concluded that there is no requirement that LECs give customers making Austin-bound calls the same special rate available for calls made to the San Marcos ELCS Area. The Texas PUC also ordered ASAP to register with the State of Texas as a non-dominant telecommunications carrier.

ASAP opposes the outcome of the Texas decision and seeks federal preemption under a number of different theories. Preemption, however, is not appropriate because ASAP has not established a legal basis to warrant preemption of the Texas PUC’s decision. Neither express nor implied preemption under the Supremacy Clause is warranted here because ASAP has failed to demonstrate that the Texas PUC’s decision intrudes on an area where Congress either has expressed an intent to preempt all state regulation, or delegated to the FCC the authority to adopt regulations. The FCC has never intruded on a state’s decision to establish LEC local calling areas as ASAP would propose be done here.

Preemption is not appropriate under either of the statutory provisions for preemption that ASAP has relied on in its Petition -- Section 253 and Section 332 of the Communications Act of 1934, as amended (the “Act”). Section 253 requires that regulation be preempted if it prohibits or has the effect of prohibiting the provision of telecommunications services. ASAP has made no showing as to how allowing CenturyTel to charge its own customers a toll charge in this situation prohibits or effectively prohibits ASAP from providing service. As a threshold matter, ASAP has not shown that the imposition of a toll charge on CenturyTel’s customers negatively impacts

ASAP in any way. Even if it had, however, ASAP has failed to show that the other options for avoiding the toll charge -- such as the direct-interconnection arrangements ASAP has had for a number of years with area LECs -- are not feasible alternatives for providing its customers the in-bound toll-free service ASAP desires.

Preemption under Section 332 of the Act also would be inappropriate because this section only forbids State actions that regulate the entry or rates of CMRS carriers. For the same reasons that ASAP has failed to show that its entry into the market has been restricted for purposes of Section 253, it also fails to do so for purposes of Section 332. Because the Texas decision clearly does not regulate the rates that ASAP can charge, there is no basis for preemption under Section 332.

Nor is conflict preemption appropriate. Conflict preemption is only appropriate where a state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Texas decision at its core concerns the definition of a state-designated "extended local calling service" area for intrastate ratemaking purposes. This clearly is within the scope of intrastate activities which the State is permitted to regulate. The Texas decision does not conflict with federal law, nor is it impossible for ASAP to comply with both federal law and the Texas decision.

For these reasons, preemption of the Texas PUC's decision is inappropriate and ASAP's Petition for Preemption should be denied.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
ASAP Paging, Inc.) WC Docket No. 04-6
Petition for Preemption of Public Utility Commission)
of Texas Concerning Retail Rating of Local Calls to)
CMRS Carriers)

OPPOSITION OF CENTURYTEL OF SAN MARCOS, INC.

I. BACKGROUND

A. Factual Background

CenturyTel of San Marcos, Inc. ("CenturyTel") is an incumbent local exchange carrier ("ILEC") in San Marcos, Texas.³ ASAP Paging, Inc. ("ASAP") is licensed as a commercial mobile radio service ("CMRS") provider in Texas.⁴ ASAP offers paging service and also provides interconnection to the public switched telephone network and transport to Internet Service Providers ("ISPs"), using the NPA-NXXs provided to ASAP as a CMRS carrier.⁵

Texas law allows for a special arrangement, known as extended local calling service ("ELCS"), which expands the toll-free calling area thereby allowing customers to call certain adjacent exchanges without paying a toll charge even though such a call would otherwise be a toll call based on the geographic location of the calling

³ Order, PUC Docket No. 25673, SOAH Docket No. 473-02-2503, Texas Public Utilities Commission (Oct. 9, 2003) (attached as Exhibit 1 to Petition) (hereinafter "Order") at 2.

⁴ *Id.*

⁵ *Id.* at 10-12.

and called parties.⁶ As described in the Public Utility Regulatory Act (“PURA”), Chapter 55, Subchapter C, the specific purpose of ELCS arrangements, which must be approved by the Texas PUC, is to provide toll-free calling to exchanges of specified sizes and with geographic proximity or with a community of interest.⁷

San Marcos, the area served by CenturyTel, is part of an ELCS arrangement with adjacent SWBT and Verizon exchanges of Fentress, Kyle, and Lockhart (“San Marcos ELCS Area”).⁸ CenturyTel’s San Marcos customers do not incur a toll charge when they call parties who are located in the San Marcos ELCS Area, even though these exchanges otherwise would be located outside the San Marcos local calling area.⁹ The ELCS arrangement is provided to the San Marcos ELCS Area by means of direct end-office-to-end-office trunks between the four exchanges (San Marcos, Fentress, Kyle, and Lockhart) that are owned and maintained by the LECs (CenturyTel, Verizon Southwest, and Southwestern Bell Telephone (“SWBT”)) by which the LECs jointly provide ELCS between their respective exchanges.¹⁰

ASAP obtains NPA-NXX codes as a CMRS carrier. ASAP has had in place for a number of years a wide-area calling arrangement for the majority of these telephone numbers,¹¹ using the 512/222 NXX for paging traffic.¹² The wide-area calling arrangement allows CenturyTel customers in San Marcos to call ASAP customers

⁶ *Id.* at 14-15.

⁷ *Id.* at 6.

⁸ *Id.* at 14-15.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 11-12.

¹² *Id.*

assigned a telephone number in the 512/222 NXX without incurring a toll charge even though ASAP's switch is located in Austin.¹³ The CMRS customer is reverse-billed for the toll charges that normally would apply to the calling party under CenturyTel's tariff. Because Austin is located outside the San Marcos ELCS Area, without the wide-area calling arrangement, such calls otherwise would be rated as toll to the calling party, the CenturyTel customer, in accordance with CenturyTel's intrastate tariff. The majority of ASAP's paging customers use the wide-area calling arrangement associated with the 512/222 NXX, which is not at issue here.¹⁴

The NPA-NXXs at issue here are 512/265, 512/384, and 512/580 NXXs (collectively "Austin Virtual NXX Codes"). ASAP obtained these codes by virtue of its status as a CMRS carrier.¹⁵ Unlike the 512/222 NPA-NXX, which is assigned only to paging customers, the 512/265 and 512/580 NPA-NXXs are assigned by ASAP to ISP customers only, and the 512/384 NPA-NXX is assigned by ASAP to both paging and ISP customers.¹⁶ ASAP has nominally designated these NXXs as being assigned to exchanges within the San Marcos ELCS Area.¹⁷ In reality, ASAP actually provides the 512/265, 512/580, and the 512/384 NPA-NXX codes to its paging and ISP customers without regard to whether the customer is -- or ever will be -- physically located or

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 13, 15.

¹⁷ *Id.*

geographically proximate to Fentress, Kyle, and Lockhart, thereby creating a “virtual NXX.”¹⁸

Because ASAP does not have any facilities located within the San Marcos ELCS Area that would allow for termination of calls from San Marcos, all calls to ASAP’s Austin Virtual NXX Codes must be routed to ASAP’s switch in Austin.¹⁹ Thus, calls from CenturyTel’s San Marcos customers to the ASAP’s paging and ISP customers that have been assigned Austin Virtual NXX Codes must travel outside CenturyTel’s local calling area (and the San Marcos ELCS Area, for that matter) to ASAP’s point of interconnection in Austin, Texas.²⁰ The ASAP switch is connected through a Type 2A interconnection arrangement to the SWBT Greenwood tandem switch in Austin.²¹ At the time that this dispute arose, this was ASAP’s only point of interconnection to the LATA (“Local Access Transport Area”).²² Thus, when a CenturyTel customer in San Marcos calls an NPA-NXX that ASAP has associated with Kyle, Lockhart, or Fentress, the call must travel to CenturyTel’s San Marcos tandem switch to Austin via a *toll* trunk between the CenturyTel San Marcos switch and the SWBT Greenwood tandem switch located in Austin.

Once paging traffic reaches the ASAP switch in Austin, it is then routed to a satellite facility in Chicago.²³ Once it reaches the satellite facility, the paging traffic is uploaded to the satellite, which then sends a signal to ASAP paging transmitters placed

¹⁸ *Id.*

¹⁹ *Id.* at 12, 15.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 15-16.

²³ *Id.* at 10-11.

throughout the state and, for those paging customers with national coverage, transmitters owned by other companies throughout the country.²⁴ All of these transmitters send out a signal simultaneously upon receiving the satellite transmission, and the paging customer's pager will pick up the signal from whichever paging tower is in range.²⁵ Thus, it is impossible to know where ASAP's paging customer is located at the time the call is completed.²⁶ ISP-bound traffic also is routed to the ASAP switch in Austin, and then is routed to the ISP whose facilities are co-located at the ASAP switch. All of ASAP's traffic is one-way; calls are not placed from any of ASAP's NPA-NXXs.²⁷

Initially, CenturyTel rated all calls to ASAP's Austin Virtual NXX Codes as toll calls, consistent with CenturyTel's tariff. CenturyTel subsequently received a call from ASAP indicating that the calls should be rated as local calls. Based on the erroneous assumption that all the calls to the Austin Virtual NXX Codes were local wireless calls, a CenturyTel employee inappropriately changed the rating of the calls from toll to local. CenturyTel then contacted ASAP regarding the negotiation of an interconnection agreement for the exchange of traffic that ASAP had claimed to be local traffic. CenturyTel determined that some of the calls to ASAP's new ELCS-associated NPA-NXXs (512/265, 512/384, and 512/580 NXXs) lasted several hours -- a trait uncharacteristic of paging traffic. After an internal investigation, CenturyTel determined that these calls were being terminated to ASAP's ISP customers. CenturyTel gave ASAP notice that, subject to entering into an agreement, it would change its switch translations

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 10.

and begin requiring that its San Marcos customers dial one (or zero) plus the number to call these NPA-NXXs and charging toll charges to its customers for these calls, just as CenturyTel charges its customers making other calls outside the San Marcos ELCS Area.²⁸ These toll charges to CenturyTel's customers are the subject of these proceedings.

B. The Texas PUC's Decision

ASAP filed a complaint against CenturyTel with the Texas Public Utility Commission ("Texas PUC"), alleging that CenturyTel improperly assessed its customers toll charges for calls to ASAP's customers that were assigned Austin Virtual NXX Codes. The Texas PUC held that calls to ASAP's Austin Virtual NXX Codes were properly rated as toll.²⁹

The Texas PUC found that the calls from San Marcos customers to ASAP's Austin Virtual NXX Codes are not eligible for ELCS treatment, and CenturyTel properly rated them as toll calls.³⁰ The Texas PUC explained that, because ELCS was clearly meant to provide toll-free calling to exchanges with geographical proximity or with a community of interest, calls must have a geographical correlation to the ELCS exchange areas in order to be eligible for ELCS treatment.³¹

In order to determine whether the calls were local or toll under state law, the Texas PUC needed to determine the geographical parameters of the transmission. Applying its precedent, the Texas PUC determined that the geographic location of the

²⁸ *Id.* at 14.

²⁹ *Id.* at 7-8.

³⁰ *Id.*

³¹ *Id.* at 6.

customers -- the calling customer and the called customer-- is the appropriate factor for determining the jurisdiction of the call and thus the determining factor for differentiating toll calls from ELCS calls.³²

The Texas PUC explained that, when a San Marcos customer calls an ISP that collects traffic from a source colocated with ASAP's switch in Austin, the call does not qualify for ELCS rating because the called party is located outside the San Marcos ELCS Area.³³ The same is true when a San Marcos customer calls an ASAP paging customer. When a customer calls an ASAP paging customer assigned to an Austin Virtual NXX Code, it is impossible to determine the precise geographical location of the paging customer because of the one-way nature of paging traffic and because all paging towers transmit simultaneously.³⁴ There is no way to determine which paging tower(s) actually transmitted the traffic to the paging device, completing the telecommunication.³⁵ Thus, the Texas PUC determined that, for purposes of determining the geographic scope of the call, the called party is actually ASAP's paging service, which is located in Austin, outside the ELCS area.³⁶

ASAP does not dispute that all calls to its paging and ISP customers must travel over the trunk between CenturyTel's San Marcos tandem and the SWBT Greenwood tandem or that they travel to ASAP's switch in Austin where they are transmitted to Chicago or routed to the ISP whose facilities are co-located at the ASAP

³² *Id.* at 7.

³³ *Id.* at 6.

³⁴ *Id.* at 6-7.

³⁵ *Id.*

³⁶ *Id.* at 7.

switch. Nor does ASAP dispute that CenturyTel's published tariffs rate *all* calls that travel over this trunk to the SWBT Greenwood tandem as toll calls. The Texas PUC determined that, because CenturyTel must assess charges in accordance with its tariff, CenturyTel is following the law by complying with its tariff when charging its own customers toll rates.³⁷ Because the calls had no geographical correlation or community of interest with the ELCS area, ELCS rates were not appropriate or required.³⁸ The Texas PUC also specifically determined that CenturyTel is not acting in an anti-competitive manner by charging toll rates for these calls, as it does for all calls to Austin absent special agreement.³⁹

II. PREEMPTION IS INAPPROPRIATE HERE BECAUSE THE TEXAS PUC'S DECISION WAS BASED ON A PROPER APPLICATION OF STATE LAW THAT DOES NOT CONFLICT WITH OR INTRUDE ON FEDERAL REGULATION.

Despite the legal and factual soundness of the Texas PUC's opinion, ASAP seeks preemption of the decision by the FCC. Preemption is not appropriate in this case. The Texas PUC properly decided issues squarely within its jurisdiction in such a manner that does not conflict with federal law or present any barrier or limit on entry or competition. Accordingly, the FCC should deny ASAP's Petition.

While federal preemption of a state statute or ruling can be based on express, implied, or conflict preemption, federal law preempts state law only where it is clear that Congress intends to preempt state law in the particular area at issue or where

³⁷ *Id.* at 7-8.

³⁸ *Id.*

³⁹ The Texas Commission also determined that ASAP was required to register with the State as a non-dominant carrier. That portion of the decision will not be addressed here.

federal and state law are in conflict such that complying with both is impossible, or complying with state law would conflict with a federal objective.⁴⁰ There is a longstanding presumption against preemption of any area traditionally subject to state regulation.⁴¹

A. Express Preemption is Not Warranted Under Either Section 253 or Section 332 of the Act.

ASAP has alleged that specific preemption is appropriate under both Sections 253 and 332 of the Act. However, ASAP fails to satisfy the requirements for preemption under either section of the Act.

1. Preemption is Not Warranted Under Section 253 of the Act.

In order to show that preemption of the Texas decision is warranted under Section 253, ASAP must demonstrate that the Texas decision falls within the scope of subsection 253(a), which provides that no state or local requirement may “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴² The FCC has explained this standard to mean something more than the mere regulation of a carrier or class of carriers -- Section 253(a)

⁴⁰ *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141 (1982); *O’Connor v. UNUM Life Ins. Co. of Am.*, 146 F.3d 959 (D.C. Cir. 1998).

⁴¹ *Wabash Valley Power Ass’n v. Rural Electrification Admin.*, 988 F.2d 1480, 1486 (7th Cir. 1993) (stating that “when regulation is of a field traditionally occupied by the states ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress’”).

⁴² 47 U.S.C. §253(a); *see also In The Matter of Amigo.net For Declaratory Ruling Regarding the Effect of Sections 253 and 257 of the Telecommunications Act of 1996 on an Agreement for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management*, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10966 (“*Amigo.net*”).

prohibits only those regulations that effectively limit competitive entry.⁴³ As described below, the Texas PUC's decision does not limit ASAP's competitive entry into the marketplace.

As the petitioner, ASAP bears the burden of demonstrating facts that prove that the Texas decision violates Section 253, and preemption is therefore appropriate under that section.⁴⁴ ASAP must provide "credible and probative evidence that the challenged requirement" violates Section 253.⁴⁵ ASAP, as petitioner, must provide examples of how and why ASAP is unable to effectively compete in the market for telecommunications services due to the Texas decision.⁴⁶ Section 253 preemption is not appropriate in this case because ASAP has not shown that the Texas PUC's decision creates any barrier whatsoever to entry or competitive participation in the communications market.

In order to make the necessary showing that preemption is warranted under Section 253, ASAP must show that the Texas decision (1) completely bars prospective competitors from lawfully providing an intrastate or interstate telecommunications service, or (2) the decision materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.⁴⁷ In *Huntington Park*, the FCC concluded that a city ordinance

⁴³ *Id.*; see also *In the Matter of Am. Communications Serv. Inc., MCI Telecomm. Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 21579, 21588 ("MCI").

⁴⁴ *Amigo.net*, 17 FCC Rcd at 10967.

⁴⁵ *MCI*, 14 FCC Rcd at 21588.

⁴⁶ *Id.* at 21625-21626.

⁴⁷ *In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and

which restricted payphone operators from installing new outdoor payphones on private property and on the public rights-of-way (an agreement between the city and Pacific Bell permitted Pacific Bell to maintain payphones on public rights-of-way) did not “completely bar prospective competitors from providing payphone service in the Central Business District;”⁴⁸ thus, the FCC declined to preempt the city ordinance under its Section 253(a) authority. Similarly, the FCC should deny ASAP’s preemption claim. Where a state decision has no anti-competitive impact, as is the case here, preemption is inappropriate.

ASAP argues that it is impossible for it to provide paging and other services if CenturyTel is permitted to rate the relevant calls as toll calls. However, that the Texas PUC concluded CenturyTel is entitled to impose a toll charge on San Marcos customers who call ASAP’s customers assigned telephone numbers with Austin Virtual NXX Codes does not in any way impede or eliminate ASAP’s ability to provide service to its paging customers. For example, ASAP has not shown that it has been unable to provide service to its existing customers or that it has lost any customers since CenturyTel began imposing on its own customers a toll charge for making calls to ASAP customers that are assigned a virtual NXX.

In fact, ASAP’s inability to demonstrate the anti-competitive effect of the Texas decision distinguishes the present case from those cases where the FCC has preempted state or local regulations under Section 253(a). In *Classic Telephone*, the city

Order, 12 FCC Rcd 14191 (1997) (“*Huntington Park*”); *Amigo.net*, 17 FCC Rcd at 10968.

⁴⁸ *Huntington Park*, 12 FCC Rcd at 14205-14206 ¶30.

denied a prospective LEC franchise authority to provide service anywhere in the city,⁴⁹ and in *New England*, state regulation prohibited non-LECs from providing payphone service.⁵⁰ Unlike *Classic Telephone* and *New England*, however, ASAP fails to provide any evidence demonstrating that it has been foreclosed from the market. Accordingly, ASAP's preemption claims should be dismissed because it has not provided any evidence to support its bald assertions that CenturyTel's imposition of toll charges harms ASAP's competitive position in the marketplace.

Furthermore, the competitively neutral effect of the Texas decision is demonstrated by the fact that ASAP has several options available to it to provide service to its customers in the manner that ASAP desires. As the FCC noted in *Huntington Park*, where there are other competitive alternatives available, a competitor will fail in making a case that the regulation at issue completely bars it from lawfully providing a telecommunications service. For example, the city ordinance that was the subject of dispute in *Huntington Park* did not prohibit plaintiffs from installing payphones indoors on private property and outdoors on the public rights-of-way in the Central Business District.⁵¹ Similarly, ASAP has several other options available to it to provide paging service to Texas customers who prefer that callers in the San Marcos area be able to reach

⁴⁹ *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996) ("*Classic Telephone*").

⁵⁰ *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 12 FCC Rcd 5215 (1997) ("*New England*").

⁵¹ *Huntington Park*, 12 FCC Rcd at 14205-14206 ¶ 30. Cf. *The Public Utility Commission of Texas, et. al*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (FCC preempted, in part, on the grounds that state law requiring carriers to build out their own networks conflicted with the express terms of Section 251 of the federal Communications Act of 1934, as amended, which permits resale).

them without a toll charge. The most obvious way for ASAP to provide this service is to negotiate with the LECs in the San Marcos ELCS Area a wide-area calling arrangement, an approach that ASAP has used for several years for a majority of its paging customers.⁵² The wide-area calling arrangement apparently has been successful, as ASAP continues to use it for the majority of its customers.

Other options are also available to ASAP. For example, ASAP could provide toll-free numbers to its paging customers, so that they could receive toll free calls from customers anywhere in Texas (or the country, if so desired). Another option is for ASAP to establish a physical point of interconnection and direct local trunks with CenturyTel and the other LECs that operate in the San Marcos ELCS Area and pick up the traffic there, which would eliminate the toll charge. ASAP has not shown that any of these -- or any other method of eliminating the toll charge -- would be cost prohibitive or would preclude or materially impede its participation in the market in any way.

Because ASAP has not shown that the toll charge to CenturyTel's customers limits or affects its ability to provide service, and because ASAP has multiple options to eliminate the toll charge, ASAP has failed to demonstrate that the Texas decision negatively impacts its ability to provide service. As such, the decision does not fall within the purview of Section 253 preemption.

With respect to the second question whether the Texas PUC decision materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment, ASAP also fails. ASAP has not shown that the Texas decision results in it being treated differently from

⁵² See *supra* p. 2-3.

any other CMRS provider, or any other telecommunications provider for that matter. Nor has ASAP provided any evidence that it has been placed at a competitive disadvantage as compared to other providers. CenturyTel's tariff designates traffic between its San Marcos tandem and SWBT Greenwood tandem as toll. In the absence of a wide-area calling arrangement such as the one ASAP negotiated for its 512/222 NXX, all traffic traveling over the San Marcos-Greenwood trunk destined for Austin, regardless of the provider, is designated as a toll call in accordance with CenturyTel's tariff. ASAP has not shown that any carrier is gaining a competitive advantage over it, or that ASAP is placed at a competitive disadvantage relative to other market participants. By complying with the terms of its tariff, CenturyTel is imposing toll charges in a non-discriminatory manner in accordance with the ELCS scheme derived by the state. Finally, like the plaintiffs in *Huntington Park*, ASAP fails to provide any evidence that it lacks a commercially viable opportunity to provide customers in-bound toll-free service, or that evidence that such in-bound toll-free service would be impractical and uneconomic.⁵³ That ASAP already provides in-bound toll-free service demonstrates that ASAP has both practical and economic alternatives available to it. Accordingly, the FCC must deny ASAP's preemption claims under Section 253 of the Act.

2. Preemption is Not Warranted Under Section 332(c)(3) of the Act.

As an initial matter, CenturyTel notes that although ASAP's Petition quotes Section 332 of the Act, ASAP fails to articulate a basis for preemption under that section of the Act, and most significantly, fails to articulate a Section 332 standard and how that standard should be applied in this case.

⁵³ *Huntington Park*, 12 FCC Rcd at 14210 ¶41.

In any event, preemption remains inappropriate under Section 332 of the Act. Section 332 allows the FCC to preempt state regulation only to the extent that such regulation precludes (or effectively precludes) entry of CMRS providers, precludes reasonable interconnection, would be inconsistent with the federal right to interconnection, or affects the rates that may be charged by CMRS carriers.⁵⁴ Although Section 332(c)(3) prohibits states from regulating CMRS rates and entry, it permits states to regulate the “other terms and conditions” under which CMRS is provided.⁵⁵ As the FCC has explained, the legislative history shows that Congress intended that the phrase “terms and conditions” to include “such other matters as fall within a state's lawful authority.”⁵⁶

For reasons already explained above, the Texas PUC's decision does not in any way affect ASAP's entry or regulate its participation in the CMRS market. Nor does the Texas PUC's decision regulate the rates that ASAP may charge. Any argument that the Texas PUC's decision regulates ASAP's entry into the market or its rates by making it marginally more expensive for ASAP to conduct business is without merit. The FCC has rejected similar arguments in the past, explaining that the fact that a state action may impose a fee on CMRS providers, increase their cost of doing business, or delay the profitability of new entrants does not rise to the level of a preemptible

⁵⁴ *In the Matter of Interconnection Between Local Exchange Carriers & Commercial Mobile Radio Service Providers*, 11 FCC Rcd 5020, 5073 (1996).

⁵⁵ *In the Matter of Petition of Pittencrieff Communications Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Util. Regulatory Act of 1995*, 13 FCC Rcd 1735, 1737 (1997).

⁵⁶ *Id.* at 1742-1743.

“regulation of entry or rates” under Section 332(c)(3).⁵⁷ In fact, many of the requirements that Congress intended to include within “other terms and conditions” of service that a State may regulate have the effect of increasing the cost of doing business, for instance.⁵⁸

Any claim that the Texas decision regulates CMRS rates should be categorically dismissed. While the decision allows CenturyTel to charge its customer a toll charge for calls to an ASAP customer with a number in the Austin Virtual NXX Code, that decision only affects CenturyTel’s rates. It in no way affects what ASAP may charge its customers. Because ASAP has failed to prove that the Texas PUC’s decision substantially prevents, inhibits, or regulates ASAP’s entry or participation in the CMRS market, or its rates, Section 332(c)(3) preemption is inappropriate.

B. Preemption is Not Otherwise Warranted Under the Supremacy Clause.

According to the Supreme Court’s *Louisiana PSC* decision, the Supremacy Clause allows for express or implied preemption, which occurs when Congress expresses a clear intent to preempt a state law, or a federal agency has adopted regulations governing the area (pursuant to its statutory delegation of authority by Congress), and conflict preemption, which occurs when there is outright conflict between federal and state law or where compliance with both federal and state law is impossible.⁵⁹ None of these apply here.

⁵⁷ *Id.* at 1746.

⁵⁸ *Id.*

⁵⁹ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 376 (1986) (“*Louisiana PSC*”).

1. Neither Express Preemption Nor Implied is Warranted Under the Supremacy Clause.

For the reasons already explained, express preemption is not warranted under either of the two statutory provisions cited by ASAP as bases for preemption. Nor are there any other provisions of federal law that would expressly preempt the Texas PUC's decision. Congress has not demonstrated an intent to preempt state laws relating to extended local calling service areas or intrastate ratemaking, the two topics addressed by the Texas PUC in its order. In fact, as the Supreme Court pointed out, Section 2(b) of the Act specifically reserves the power of intrastate ratemaking and other intrastate activities to the states.⁶⁰ The definition and approval of ELCS areas in Texas, like intrastate ratemaking, is solely an intrastate activity that only affects intrastate calling within the ELCS area.

Similarly, implied preemption does not apply to this case. Implied or field preemption only occurs when Congress passes legislation that is so fulsome that there is no room for any state regulation.⁶¹ That is not the case here where regulation of intrastate communications is specifically reserved to the states by Congress.⁶² In fact, the FCC has never promulgated rules governing the definition of local calling areas. The FCC has deferred to the states' judgment on such matters. ASAP has not provided any evidence to suggest that preemption would be appropriate for any of these three subject areas.

⁶⁰ *Id.* at 374.

⁶¹ *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("*Freightliner*").

⁶² See Section 2(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 152(b); see also *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 376.

2. Conflict Preemption is Not Warranted Under the Supremacy Clause Because There is No Conflict of Law Nor Any Impossibility of Compliance by ASAP With State and Federal Law.

Conflict preemption occurs when the state law stands as an obstacle to the purpose and objective of a federal statute or rule, or when it is impossible to comply with both state and federal laws.⁶³ Although ASAP has argued that the Texas PUC's decision conflicts with federal law and thus should be preempted, the reality is that ASAP has failed to make a case for this (or any other) type of preemption.

(a) The Texas PUC's Actions Were Within Its Authority to Regulate Intrastate Activities and Do Not Frustrate or Intrude on Federal Regulation.

Conflict preemption is appropriate where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶⁴ That is not the case here, where the Texas PUC was acting well within its authority to regulate intrastate activities --a power that Congress itself has reserved to the states.

As the Supreme Court pointed out, Section 2(b) of the Act specifically reserves the power of intrastate ratemaking and other intrastate activities to the states.⁶⁵ The fact that both a state and the federal government issue regulations that involve the same industry is insufficient to warrant preemption, particularly where the State action or regulation is a valid exercise of state authority over intrastate activities. In the communications area, the Supreme Court has recognized that it is difficult to cleanly

⁶³ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) ("*Hines*"); see also *Freightliner Corp.*, 514 U.S. at 287; *Morales v. Tans World Airlines, Inc.*, 504 U.S. 374, 382 (1992).

⁶⁴ *Hines*, 312 U.S. at 67.

⁶⁵ *Louisiana PSC*, 476 U.S. at 374.

parcel out the distinctions between interstate service, regulated by the federal government, and intrastate service, regulated by the states.⁶⁶ Although the two may overlap because virtually all the same components are used to provide interstate and intrastate service, such overlap is insufficient to warrant preemption.⁶⁷ According to the Supreme Court, preemption of a state regulation is only appropriate where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁶⁸ There is no evidence that that is the case here.

The Texas decision at its core concerns the definition of an “extended local calling service” for intrastate ratemaking purposes. This clearly is within the scope of intrastate activities which the State is permitted to regulate. The definition and approval of ELCS areas in Texas and intrastate ratemaking, which are solely intrastate activities, by definition, affect only intrastate calling. Consistent with federal law in which the FCC left it to the states to define “local calling area” for LEC-CMRS interconnection,⁶⁹ the Texas PUC regulates and approves ELCS areas within the State of Texas. All ELCS calls are, by definition, made by callers in one part of the ELCS area to another. Thus, all ELCS transmissions are purely local. ASAP has not provided any evidence to suggest that, by defining ELCS areas and regulating the rates associated therewith, the Texas PUC has exceeded its authority over intrastate activities.

⁶⁶ *Id.* at 360.

⁶⁷ *Id.*

⁶⁸ *Id.* at 374.

⁶⁹ *In the Matter of Implementation of the Local Competition provisions of the Telecommunications Act of 1996: Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16013-14 ¶1035 (“*First Interconnection Order*”).

(b) Preemption is Not Warranted Because it is Possible for ASAP to Comply with Both Federal Law and the Texas Decision.

Nor does the Texas PUC's decision make it impossible for ASAP to comply with federal law. Just as it has failed to show that Congress intended to preempt in this area or that the Texas PUC's decision conflicts with federal law, ASAP has not shown that it cannot comply with federal law because CenturyTel's customers are charged a toll for calling ASAP's NPA NXXs.

The Supreme Court has explained that "impossibility" in the context of conflict preemption means a "physical impossibility."⁷⁰ If it is physically possible to comply with both the requirements of state law and with federal regulations, conflict preemption is not warranted because of "impossibility."⁷¹ There is no physical impossibility of dual compliance here. That CenturyTel imposes a toll charge on its customers who call outside the ELCS area does not force ASAP into noncompliance with any federal law or regulation.

In fact, the method used by the Texas PUC with which ASAP disagrees is wholly consistent with federal law. ASAP argues that it was inappropriate for the Texas PUC to use the location of the ASAP switch in Austin to determine whether or not the calls from CenturyTel customers were within the ELCS or toll calls. Even though ASAP may have preferred that the Texas PUC not use this method, doing so does not conflict with Federal law. The Texas PUC was using a method proposed by the FCC for determining the geographical location of the "called party" in a wireline-to-wireless traffic.

⁷⁰ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

⁷¹ *Id.*

In the *First Interconnection Order*, the FCC created two alternatives for establishing whether a call is “local” for purposes of Section 251. One possibility is to identify the location of the initial cell site associated with the CMRS end-user when a call begins as the determinant of the geographic location of a mobile customer.⁷² As an alternative, the FCC explained, *the point of interconnection between the two carriers at the beginning of the call can be used to determine the location of the mobile caller or called party.*⁷³ In the case of paging customers who receive one-way traffic from multiple paging transmitters simultaneously, the Texas PUC found it is impossible to use the first of these two methods.⁷⁴ Instead, the Texas PUC used the second method, using the first point of interconnection –ASAP’s Austin switch— as a proxy for the geographical location of the called party.⁷⁵ Given its foundation in the FCC’s own ruling, it is clear that no part of this analysis conflicts with federal law.

ASAP’s assertion that it has now placed a facility within the ELCS area in no way affects this analysis. There is no direct trunking between ASAP’s new facility and the CenturyTel San Marcos switch, as necessary to establish local calling. The point of interconnection remains the same: All traffic from CenturyTel’s local exchange customers to ASAP’s paging and ISP customers must travel over the IntraLATA toll trunk to Austin, where it is routed to the Chicago satellite earth station or picked up by ISPs.⁷⁶

⁷² *First Interconnection Order*, 11 FCC Rcd at 16017 ¶1044.

⁷³ *Id.*

⁷⁴ Order, at 10-11 (explaining that the paging traffic between the paging towers and the customer is one way, and that all paging towers fire simultaneously)

⁷⁵ Order, at 7.

⁷⁶ *See supra* p. 4-5.

The FCC has also noted that additional charges may be incurred when a local cellular number is routed outside the local exchange and the local exchange carrier is providing interconnection service.⁷⁷ In the absence of an agreement to the contrary, such as the wide-area calling arrangement in place for the 512/222 NXX, the FCC has not required a LEC to transmit traffic outside its local exchange area on toll trunks and still rate that traffic as toll-free ELCS traffic to the LEC's own customers. In addition, ASAP has not posited the existence of any federal law that conflicts with the Texas PUC's decision in a way that makes it impossible for ASAP to comply with both. In the absence of a showing of physical impossibility, ASAP has failed to make a showing of conflict preemption based on impossibility.

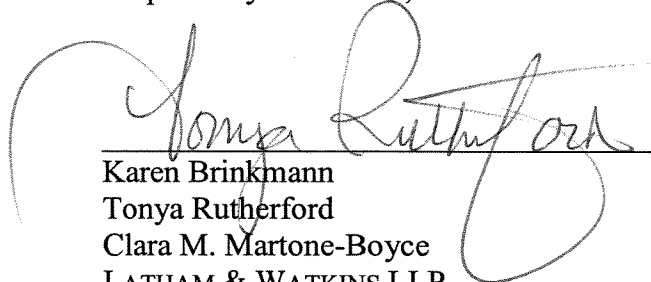
III. CONCLUSION

The Texas PUC applied Texas law within the boundaries set forth for state regulation of telecommunications carriers. ASAP has not shown that any part of the Texas order conflicts with federal law or intrudes upon areas exclusively regulated by the federal government. ASAP has attempted to use its numbering resources to give ISPs (and some paging customers) located outside the San Marcos ELCS Area a number that is toll-free to CenturyTel customers located in the San Marcos ELCS Area, despite the fact that such traffic has to be carried outside the ELCS area and over an IntraLATA toll trunk. The Texas PUC properly concluded that ASAP's actions violate state law. It thus ordered CenturyTel to charge its customers toll charges for such traffic, just as CenturyTel charges its customers for other traffic going beyond the ELCS boundary.

⁷⁷ *First Interconnection Order*, 11 FCC Rcd at 16016-17, ¶1043 n.2485.

ASAP alleges that CenturyTel's rating those calls as toll calls for CenturyTel customers competitively harms it and makes it impossible for the CMRS carrier to provide service. ASAP does not show, however, how and why this is the case. ASAP also ignores the multiplicity of other options available to it if its paging and ISP customers truly need toll-free access from the San Marcos area. ASAP has failed to meet its burden of proving express or conflict preemption. It has not shown that it was competitively harmed and harmed to such a degree that it effectively cannot provide telecommunications services, that the Texas order somehow conflicts with or encroaches on federal regulation, or that it is impossible for ASAP to comply with both federal law and the Texas decision. Without such proof, the Petition must be denied.

Respectfully Submitted,



Karen Brinkmann
Tonya Rutherford
Clara M. Martone-Boyce
LATHAM & WATKINS LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200

Carrick Inabnett
Associate Corporate Counsel
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000

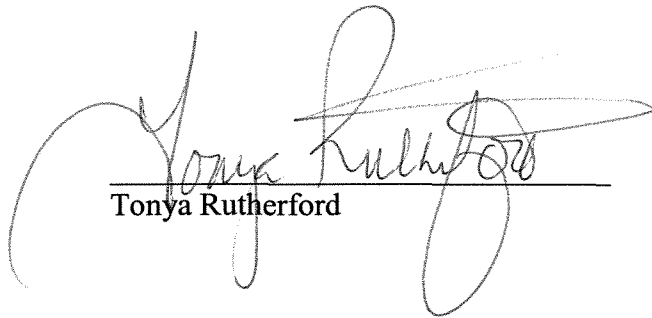
Counsel for CenturyTel of San Marcos, Inc.

Date: March 23, 2004

CERTIFICATE OF SERVICE

I, Tonya Rutherford, hereby certify that on this 23rd day of March 2004, I caused copies of the foregoing Opposition of CenturyTel of San Marcos, Inc. to be sent via first class mail, postage prepaid to the following:

W. Scott McCollough
Stumpf Craddock Massey & Pulman, PC
1250 Capital of Texas Highway South
Building One, Suite 420
Austin, TX 78746



Tonya Rutherford